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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969.

No. 1481

TERMINAL FREIGHT COOPERATIVE ASSOCIATION AND TERMINAL FREIGHT HANDLING CO.,
Petitioners,

vs.

BERNARD SAMOFF, REGIONAL DIRECTOR OF THE FOURTH REGION OF THE NATIONAL LABOR RELATIONS BOARD, FOR AND ON BEHALF OF THE NATIONAL LABOR RELATIONS BOARD AND INTERNATIONAL ASSOCIATION OF MACHINISTS, DISTRICT LODGE NO. 1,
Respondents.

PETITION FOR WRIT OF CERTIORARI BEFORE JUDGMENT TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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BERNARD SAMOFF, REGIONAL DIRECTOR OF THE FOURTH REGION OF THE NATIONAL LABOR RELATIONS BOARD, FOR AND ON BEHALF OF THE NATIONAL LABOR RELATIONS BOARD AND INTERNATIONAL ASSOCIATION OF MACHINISTS, DISTRICT LODGE NO. 1,

Respondents.

PETITION FOR WRIT OF CERTIORARI BEFORE JUDGMENT TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

Petitioners Terminal Freight Cooperative Association and Terminal Freight Handling Co., charging parties before the National Labor Relations Board, seek a writ of certiorari to review the decision of the United States Court of Appeals for the Third Circuit which dismissed petitioners' appeal below as being moot. Petitioners couple this petition with a request that in lieu of remanding this matter to the court below for disposition on the merits, this Court adjudicate those merits concurrently with its disposition of the question of mootness: hence, to the extent this Court believes that the merits of the appeal below should be decided, this petition seeks such a decision from this Court before judgment in the court below.

OPINIONS BELOW.

The unreported Order and Amended Order of the district court (no other opinion having been rendered by that court) issued on April 29, 1970. (App. pp. 4A-6A)

The opinion of the Court of Appeals, dismissing petitioners' appeal of the district court's Orders, issued on December 12, 1969 and is reported at ..... F. 2d ....., 72 LRRM 2989. (App. 1A-3A)

JURISDICTION.

The opinion and judgment of the Court of Appeals were filed and entered on December 18, 1969.

On January 22, 1970 petitioners filed a motion for leave to file a petition for rehearing out of time.

On January 27, 1970, the court below granted petitioners leave to file a petition for rehearing.

On February 27, 1970, petitioners filed that document.

On March 26, 1970, the court below denied the petition for rehearing.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1) and Rule 20 of this Court.

QUESTIONS PRESENTED.

(1) Whether charging parties before the National Labor Relations Board, whose charges give rise to the mandatory filing of the Regional Director's petition for injunctive relief under Section 10(l) of the National Labor Relations Act, possess the status of "parties" in the ensuing district court proceedings filed pursuant to their charges and on their behalf.

(2) Whether the Regional Director, having filed a petition for injunctive relief as mandatorily required under Section 10(l), may thereafter, by seeking other or lesser relief, preclude the holding of a hearing and thus deprive the charging parties of "an opportunity to appear by counsel and present any relevant testimony" as provided in Section 10(l).

(3) Whether the district court, in proceedings under Section 10(l), may adjudicate the charging parties' rights and interests without affording those charging parties a right to be heard on their behalf or without considering their objections to the district court's proposed disposition of the case.

(4) Whether charging parties have standing to appeal from an adverse and prejudicial district court decision rendered in a case arising under Section 10(l).

STATUTE INVOLVED.

The relevant provisions of the National Labor Relations Act, as amended, § 61 Stat. 136, 73 Stat. 519, 29 U. S. C. § 151 *et seq.* are set forth in the attached Appendix. (App. pp. 32A-36A)

STATEMENT OF THE CASE.

Petitioner Terminal Freight Cooperative Association is a non-profit shippers' association consisting of forty-five (45) companies which receives less-than-carload and less-than-truckload shipments, consolidates such shipments into carload lots in order to secure the advantages of lower costs through large volume shipment, and reships such goods to members' plants at locations throughout the United States. Petitioner Terminal Freight Handling Company is a non-profit Delaware corporation engaged in the handling, consolidation and trans-shipment of freight as manager of the Association.

The International Association of Machinists, District Lodge No. 1, Respondent Union herein, had been engaged in a labor dispute with Sears, Roebuck and Co., a member of Terminal Freight Cooperative Association. In support of that primary dispute the Union picketed the petitioners, notwithstanding the fact that they were strangers to the Union's dispute with Sears.

The petitioners, as a consequence of such conduct, filed charges with the National Labor Relations Board on April 18, 1969, alleging that Respondent Union had engaged in unlawful picketing in violation of the prohibition of Section 8(b)(4)(i)(ii)(B) of the Act against secondary boycotts.

The Regional Director of the National Labor Relations Board's Fourth Regional Office thereupon caused an investigation of those charges to be conducted. As a result of that investigation, he was persuaded that reasonable cause existed to believe that Respondent Union did in fact commit the violations as charged by engaging in prohibited secondary conduct and that a Complaint should issue. (App. 13A) The Regional Director also concluded from his investigations that the continuation of Respondent's unlawful picketing would cause substantial and irreparable injury not only to the petitioners but also to the National Defense in that the picketed secondary employers, *i.e.*, the petitioners, would be prevented from fulfilling their contractual commitments to, among others, various employers engaged in such Defense work. (App. 16A)

On April 24, 1969, the Regional Director filed a "Petition for Injunction Under Section 10(l) of the National Labor Relations Act, as Amended" in the United States District Court for the Eastern District of Pennsylvania, in which he sought an immediate Temporary Restraining Order enjoining the Respondent from engaging in the charged unlawful acts. This Petition further requested the Court to issue an Order directing Respondent to appear before it at a time to be fixed by the Court and show cause why an injunction should not issue under Section 10(l) further enjoining Respondent from the commission of the described acts pending the Board's final disposition of the charges filed by the charging parties. (App. pp. 12A-31A)

The pertinent language of Section 10(l), pursuant to which the Regional Director acted, provides as follows:

> "Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph 4(A), (B), or (C) of section 8(b), . . . the preliminary investigation of such charge shall be made forthwith and given priority over all cases except

> cases of like character in the office where it is filed or to which it is referred. If, after such investigation, the officer or regional attorney to whom the matter may be referred has reasonable cause to believe such charge is true and that a complaint should issue, he shall, on behalf of the Board petition any District Court of the United States . . . for appropriate injunctive relief pending the final adjudication of the Board with respect to such matter. Upon the filing of any such petition the district court shall have jurisdiction to grant such injunctive relief or temporary restraining order as it deems just and proper, notwithstanding any other provision of law."

On April 24, 1969, the district court by the Honorable Ralph C. Body, issued the requested Temporary Restraining Order, effective until April 29, 1969, which action was expressly predicated on the court's belief that it had been shown reasonable cause to believe that the Respondent had committed the charged violations, including those which affected the National Defense. The court also ordered Respondent to appear before it on April 29, 1969, and show cause why further injunctive relief pursuant to Section 10(l) should not be granted. (App. pp. 7A-10A)

On April 29, 1969, Judge Body, in lieu of conducting a hearing on the Regional Director's pending Petition for an Injunction, issued an Order approving a Stipulation proposed and executed by and between the Regional Director and the Respondent Union. (App. pp. 4A-6A) The charging parties, petitioners herein, were neither consulted on the decision to execute this Stipulation in lieu of an injunction nor on the provisions which it should contain. Moreover, they strongly objected to the approval of the Stipulation on the ground that its provisions afforded unnecessarily inadequate protection and relief from a recurrence of the Respondent Union's unlawful picketing. In these discussions, conducted in the Judge's chambers, the charging

parties urged Judge Body to conduct a hearing on the Regional Director's pending Petition for Injunction. Judge Body declined to hear and consider their objections, however. He predicated his refusal on the ground that they did not possess the status of "parties" in the district court proceeding; that is, they were not "parties" and had not moved to "intervene", although their counsel had filed an appearance in the case (App., pp. 11A), and therefore they were asserted to lack standing to be heard.

The Judge incorporated this ruling in his Order approving the Stipulation:

> "The Stipulation of Petitioner [the Regional Director] and Respondent as modified and initialed by them is hereby approved over objection of Terminal Freight Cooperative Association and Terminal Freight Handling Co., Charging Parties, who, having entered their appearances by counsel but who have not moved to intervene, do not constitute parties and lack standing to be heard on their objections." (App., p. 6A.)

Thus the charging parties-petitioners were not permitted to protest what they viewed as the Regional Director's compromise of his original position in which he sought a hearing on his Petition and an Order of Court granting injunctive relief, which compromise resulted in damage to their essential interests and deprived them of the specific relief guaranteed in the Act.

The petitioners then appealed from the Judge's order of April 29, 1969, on the grounds that they were denied their rights as "parties" to the proceedings, the existence of which status obviated any need to move to intervene there; that they were deprived of the right, guaranteed in Section 10(l), to present evidence at a hearing on the pending petition for injunctive relief in support of that petition; that they were denied any voice in the disposition of the case although their rights and interests were being adjudi-

cated there; and that they had standing to appeal from the denial of these rights.

The Board moved to dismiss the appeal in the Third Circuit on two grounds. First, charging parties were said to lack standing to appeal *either* the alleged denial of rights conferred upon them in the District Court by Section 10(l) *or* the result reached by the district court judge; this lack of standing was further said to be a consequence of the statute's failure expressly to accord them such appellate rights. Second, the Norris-LaGuardia Act, 29 U. S. C. §§ 101-115 (1932), allegedly bars any efforts by private parties to secure injunctive relief, whether by an initial application to the courts or by an effort to correct an erroneous refusal to grant such relief pursuant to a petition filed by the Board. Concurrently, the Union moved to dismiss the appeal on the basis of mootness; that is, since the underlying dispute between the Union and Sears, pursuant to which petitioners had been picketed, had been settled while the appeal was pending in the Third Circuit, therefore that appeal had become moot.

The court below dismissed petitioners' appeal on the ground that the appeal had become "clearly moot" because the underlying dispute which gave rise to Respondent-Union's unlawful picketing had been settled during the course of the litigation.

REASONS FOR GRANTING THE WRIT.

A. THE IMPORTANCE OF THE QUESTIONS PRESENTED.

The questions presented for review here are of fundamental importance to charging parties before the Board since what is involved is a requested determination of the nature and breadth of their participatory role in Section 10(l) proceedings in the district courts governing their vital interests. Are they "parties" in such proceedings? Moreover, these questions are of fundamental importance in the overall interpretation of Section 10(l). For example, does the statutory requirement that the Regional Director "shall" petition for injunctive relief permit him to seek other or lesser relief after his injunction petition has been filed? May the Board and the court, by approving such other relief, deprive charging parties of the statutory right "to present any relevant evidence" in favor of an injunction? May the court dispense with the holding of a formal hearing despite the charging parties' objections? May the charging parties institute an appeal?

The fact that these quite basic questions are as yet unanswered demonstrates the need for this Court's clarification of the meaning of Section 10(l).

B. THE JUSTIFICATION FOR GRANTING CERTIORARI BEFORE JUDGMENT BELOW ON THE MERITS.

Much of the needed clarification of Section 10(l) will result from this Court's opinion in *Sears, Roebuck and Co.* v. *Carpet, Linoleum, Soft Tile and Resilient Floor Layers, Local Union No. 419, AFL-CIO, et al.* (No. 476).[1] The

1. Petitioners herein were granted the status of *amici curiae* in *Sears* and filed briefs supporting the positions of the charging party, Sears, Roebuck and Co.

Sears case was argued before this Court on March 3, 1970 and is currently pending decision. That case, too, involves an inquiry into the nature of the rights exercisable by charging parties under Section 10(l). Specifically, it involves the questions, also present here, as to whether charging parties may appeal from adverse district court decisions under 10(l),[2] whether the Norris-LaGuardia Act is relevant as a limitation on their right to appeal, and whether Congress' silence in 10(l) in granting appellate rights to charging parties necessarily evidences an intent that no such rights should exist.

While the *Sears* case will of necessity decide these specific common questions, it may also decide the remaining outstanding questions here as a logical consequence of the rules to be promulgated there. Thus, should this Court decide in *Sears* that the prohibitions of Norris-LaGuardia do not apply to appellate review, then that holding would presumably apply to review by charging parties of the *procedures* followed by the district court in reaching its decision (involved here) as well as to the review of the substantive merits of the decision (involved both here and in *Sears*). Similarly, should this Court hold in *Sears* that appellate review is afforded charging parties under Section 10(l) by virtue of their status as "parties" in the district court (as contended, *inter alia*, by Sears) then that decision will govern the remaining questions presented here concerning the charging parties' proper participatory role in proceedings under Section 10(l).

It therefore appears clear that the instant case presents identical or very similar questions to those now pending

2. Further support for the proposition that such a right of review exists absent an express grant of statutory authority derives from two recent decisions of this Court this term: *Association of Data Processing Service Organizations, Inc.* v. *Camp, et al.* (No. 85) and *Barlow, et al.* v. *Collins, et al.* (No. 249). (Both decisions issued March 3, 1970.)

in *Sears*. This Court has frequently exercised its authority to grant certiorari before judgment in cases where similar or identical issues of importance are already pending before the Court and where it is desirable to review them simultaneously.[3] That requisite desirability is readily discernible here; (1) such a simultaneous consideration will assist this Court in framing appropriate rules in *Sears* by revealing another and somewhat different factual context which may be controlled by them and in which they will also govern; (2) it will avoid unnecessary and duplicitous litigation before the Third Circuit in the instant case; and (3) by resolving together the questions presented in the two cases this Court will also provide needed guidance in a number of related situations involving disputes over the proper role of charging parties under Section 10(l) and in which various Courts of Appeals are in deep and irreconcilable conflict.

C. THE WIDE RANGE OF UNDECIDED AND RELATED PROBLEMS WHICH WILL BE RESOLVED BY GRANTING CERTIORARI BEFORE JUDGMENT HEREIN.

In general terms, the current problems with which courts are being faced in the interpretation of Section 10(l) relate to whether charging parties may exercise rights of participation in the judicial process prior to a final Board order analogous to those they may exercise after such an order issues. It is submitted that the rationale of this Court in *U. A. W. v. Scofield et al. (Fafnir Bearing Company et.*

3. *Hannah* v. *Slawson*, 361 U. S. 910; *United States* v. *Thomas*, 361 U. S. 950; *McCulloch* v. *Sociedad Nacional*, 372 U. S. 10, 12; *Hannah* v. *Larche*, 363 U. S. 420, 422, n. 3; *McElroy* v. *Guagliardo*, 361 U. S. 283; *Reid* v. *Covert*, 354 U. S. 1, 5; *White* v. *Mechanics' Securities Corp.*, 269 U. S. 283, 299; *Johnson* v. *U. S. Shipping Board*, 280 U. S. 320, 324-25; *Graham & Foster* v. *Goodcell*, 282 U. S. 409, 411-12, 415, n. 2; *Bolling* v. *Sharpe*, 344 U. S. 873; *Porter* v. *Dixon*, 328 U. S. 252, 254.

al), 382 U. S. 205, in which this Court declared the right of all charging parties to participate as full "parties" in the appellate consideration of their cases notwithstanding the Board's participation on their behalf, compels the extension of that recognition of charging parties' vested rights in the judicial litigation of their charges to *all* stages of that process.

The necessity for deliniating the nature and extent of charging parties' rights under Section 10(l) has arisen in a variety of contexts. The *Sears* case involved the right of charging parties under Section 10(l) to appeal an adverse order of the district court when the Board refused to appeal. The instant case deals with the rights of charging parties to appeal the district court's erroneous refusal to permit them to exercise there the participatory role expressly granted them in Section 10(l), as well as to appeal the district court's refusal to grant injunctive relief. The question in *Retail Clerks Union, Local 137* v. *Food Employers Council, Inc.*, 351 F. 2d 525 (CA 9, 1965), concerned the extent to which charging parties could perform an independent role in the district court in support of the Board's petition for an injunction after the Board changed its mind about pursuing the relief sought in its own petition. *Houston Insulation Contractors Association* v. *N. L. R. B.*, 339 F. 2d 868 (CA 5, 1964), involved a charging party's attempt to secure a stay of a Board order in the Court of Appeals the effect of which would be to continue in force an injunction granted under Section 10(l) which would otherwise have expired. And in *San Francisco-Oakland Newspaper Guild* v. *Kennedy*, ... F. 2d ....., 69 LRRM 2537 (CA 9, 1968), a successful charging party sought to intervene in the Appellate Court in an action brought by a union to review the district court's grant of injunctive relief under Section 10(l).

Although each of these cases involved a somewhat different question from the others, yet they are alike in that the result in each hinged on an interpretation of the rights accruing to charging parties under Section 10(l) of the Act.

The variety of situations in which charging parties' rights depend upon an analysis of the meaning of that Section and the diversity among the Court of Appeals' decisions which have undertaken such an analysis requires this Court's attention. Thus the Tenth Circuit in the *Sears* case prohibited charging parties from appealing a denial of the Board's petition for injunctive relief principally in reliance upon the alleged requirements of Norris-LaGuardia,[4] while the Ninth Circuit in *Retail Clerks* held Norris-LaGuardia to be irrelevant to charging parties' efforts to support the Board's petition in the courts. Although the Fifth Circuit in the *Houston* case expressly reserved decision on the applicability of Norris-LaGuardia to charging parties' efforts to obtain injunctive relief via a stay, both the court's language and its action in granting the stay strongly suggest that it would not find Norris-LaGuardia to constitute a bar in cases where the Board had itself filed a petition for such relief at an earlier stage in the case. And whereas this Court in *Scofield* accorded successful charging parties equal status in the appellate courts with those who had not been successful, the later Ninth Circuit decision in *San Francisco-Oakland* refused to do so by denying charging parties the right to intervene at the appellate stage of Section 10(l) litigation.

In addition, in a recent development in the *San Francisco-Oakland* case the Respondent Union successfully secured a dissolution in the district court of a previously issued injunction under Section 10(l). (D. C., E. D., Calif., Civil No.

4. The *Sears* case appears to constitute the first instance in which a charging party before the Board has argued that it enjoyed the status of a "party" in 10(l) cases without the need, therefore, for seeking to intervene in order to protect its rights.

48511, April 6, 1970) The charging parties then sought a stay of the district court order pending their appeal of that dissolution to the Ninth Circuit. The district court denied their application for the stay. The charging parties then sought such a stay in the Court of Appeals. On April 15, 1970 that court granted the charging parties' motion (Nos. 25655, 25656). The Board thereupon filed a motion for reconsideration and modification of the court's ruling, contending that the charging parties lacked standing to appeal and to seek such relief and that the Norris-LaGuardia Act prohibited the court from granting it. This motion is now pending in the Ninth Circuit. However, by its action in granting the stay *to the charging parties,* the Ninth Circuit appears to have aligned itself with the Fifth Circuit's decision in *Houston Insulation* in which, in effect, that court held the prohibitions of Norris-LaGuardia to be inapplicable to efforts *by private parties* to secure injunctive relief or an extension of injunctive relief under Section 10(l) in support of the Board's previously filed petition. This decision, while consistent with the Ninth Circuit's earlier holding in *Retail Clerks,* is inconsistent with the Tenth Circuit's opinion in *Sears,* the review of which is now pending in this Court.

Finally, in *Samuel M. Kaynard, et al.* v. *Amalgamated Meat Cutters and Butcher Workers of North America, AFL-CIO* (D. C., E. D. N. Y., No. 69 C 1597, March 16, 1970), a charging party was granted the right to intervene in the district court litigation of a Section 10(l) case, over the union's objections, in reliance on *Retail Clerks.* In subsequent proceedings in the Second Circuit, the Union moved for a stay of the lower court order granting injunctive relief. When the charging party opposed this request the Union argued that charging parties lack standing to be heard on their objections to such motions and that the prohibitions of the Norris-LaGuardia Act barred their

participation. The charging party thereupon moved to intervene, having failed to argue that it constituted a "party" in that court such that a formal motion to intervene was unnecessary. A ruling on the motion to intervene is now pending in the Second Circuit. (Nos. 34696, 34697 and 34754)[5]

A review of these decisions reveals that their resolution, despite the differing contexts in which they arose, depends only upon the resolution of a few issues which are presented in combination in the pending *Sears* case and the instant case:

(1) Does the rationale of *Scofield* apply to district court litigation pursuant to Section 10(l) as well as to appellate court litigation pursuant to 10(e) and (f)?

(2) Do the prohibitions of the Norris-LaGuardia Act bar efforts by charging parties to secure injunctive relief, via direct appeals of adverse district court decisions or through motions for stays, pursuant to petitions for injunctive relief originally filed by the Board? Do those prohibitions operate at all once the Board has filed its petition for injunctive relief as mandatorily required by Section 10(l)?

(3) Do charging parties constitute "parties" or quasi-parties under Section 10(l) so that their right to full participation, including the right to seek appellate review, does not depend upon a successful motion to intervene?

5. The briefs filed in this Court in the *Sears* case (No. 476) were submitted by both parties to the Second Circuit in aid of their respective positions.

D. THE PRINCIPAL EXISTING JUDICIAL INTERPRETATION OF SECTION 10(l).

Most of the issues arising under Section 10(l) which have heretofore been raised were dealt with directly or inferrentially in the Ninth Circuit's *Retail Clerks* case. That case, whose facts are strikingly similar to the facts here was subsequently cited with approval by this Court in *Scofield,* thus enhancing its stature as the leading authority in its area of the law. However, much of the teaching of that case was rendered in dicta. In the interest of laying to rest such doubts as to the validity of the Ninth Circuit's reasoning as may consequently exist, this Court is urged to grant the instant petition.

The question before the Court in *Retail Clerks,* as it is here, concerned the extent and the nature of the rights possessed by charging parties pursuant to Section 10(l) in the district court proceedings to which their charges gave rise.

In *Retail Clerks,* pursuant to an appropriate charge filed with him and his investigation thereof, a Regional Director filed a petition in a district court for a temporary injunction under Section 10(l) to prevent a union from enforcing an alleged "hot cargo" agreement. Thereafter, instead of pursuing his pending petition for injunctive relief, the Regional Director executed a Stipulation with the offending union according to which the latter would cease its alleged unlawful conduct. The Regional Director filed this Stipulation in the district court and sought its approval by that Court in lieu of the Stipulation and urged the court to grant injunctive relief pursuant to the Regional Director's pending petition.

Thus the facts of *Retail Clerks* mirror those in the instant proceeding. The district court in *Retail Clerks,* however, recognized the charging parties' right to be heard on their objections to the Stipulation, unlike the district court below. After hearing the evidence, that court granted

the injunction as the charging parties requested and over the objection of the Regional Director. The union and the Regional Director then appealed from the order granting the injunction.

In his appeal, the Regional Director made two principal contentions. *First*, since the Regional Director had determined to seek a remedy other than an injunction in the district court, and since only the Regional Director may seek injunctive relief, therefore, the district court's Order constituted the granting of injunctive relief at the request of private parties in violation of Norris-LaGuardia and the policy of Section 10(l); and *second*, the private charging parties lacked standing to oppose the Regional Director's modified request for relief in the district court.

On appeal, the Ninth Circuit affirmed the district court and dismissed the Regional Director's appellate arguments as lacking merit.

With respect to the Regional Director's first contention, the Court held that Norris-LaGuardia and the policy of the Act require only that the Regional Director must *initiate* suits for injunctive relief pursuant to the mandatory duty imposed upon him by Section 10(l) whenever he has reasonable cause to believe that one of the sections enumerated therein has been violated. Once he has done so, the limitations of Norris-LaGuardia and the policy of the Act cease to inhibit the charging parties' *right* to urge the granting of injunctive relief. So long as the urging of the charging parties is consistent with the facts, theories and relief sought in the petition, they may actively *support* it despite any subsequent attempted change of position by the Regional Director. The distinction between "initiate" and "support" was found to be critical. Accordingly, the Ninth Circuit held that district courts may grant injunctions at the urging of charging parties and over the objection of the Regional Director, in cases under Section 10(l):

> ". . . where the charging parties did not petition the court independently or for relief different than that sought by the Regional Director, *but merely supported the original petition for injunctive relief requested by the Regional Director.*" (Emphasis added.)

In the instant case, as well as in the *Retail Clerks* case itself, the charging parties' objections to the Stipulation proposed by the Regional Director were in "support" of the "original petition for injunctive relief requested by the Regional Director." Hence their efforts constituted a legitimate exercise of rights in aid of a legally permissible objective, according to the *Retail Clerks* test.

The Regional Director's second appellate contention, in which he attacked the charging parties' standing to object to his decision to seek a lesser remedy than an injunction despite the pendency of his petition, was found to be equally non-meritorious. The Ninth Circuit expressly held the language of Section 10(l), in which charging parties are guaranteed the right to notice, to participation by counsel, and to an equal role in the development of relevant evidence in district courts, as sufficient to confer such standing. Moreover, the court reached the same conclusion less directly when it stated that district courts should grant appropriate relief in injunction suits under Section 10(l) whether or not the Regional Director persists in seeking such relief after he files his petition. However, if the Regional Director does not seek the injunction the district court cannot grant it *sua sponte*. It follows, therefore, that charging parties must have standing to urge such relief independently of the Regional Director if the district court is to have an option to grant it in the event of the Regional Director's change of position.

In summary, the Ninth Circuit's decision in *Retail Clerks* constitutes indistinguishable precedent for the propositions that charging parties in cases under 10(l) have the right to

be heard in the district court to urge the granting of injunctive relief, in support of and pursuant to the Regional Director's pending petition, whether or not the Regional Director continues to seek such relief. Similarly, they have standing to object to his refusal to persist in his efforts to secure such relief or to his decision to seek lesser relief. The right to make and be heard on these objections necessarily implies that the charging parties are entitled to the holding of a hearing on those objections despite the Regional Director's desire to dispense with such a hearing and to accept other than injunctive relief. And the combination of these rights should be understood to confer on charging parties the status of fully party-litigants in the district court; those are the rights which are commonly exercised only by "parties", and there are no further or greater rights which could meaningfully be exercised within the statutory scheme of the Act.

E. THE INSTANT APPEAL IS NOT MOOT.

As indicated before, the court below dismissed petitioner's appeal on the ground that the appeal had become "clearly moot" because the underlying dispute which had given rise to Respondent Union's unlawful picketing had been settled during the course of the litigation. Under the facts and circumstances of this case that conclusion is incorrect.

(1) The Case Is Not Moot in Fact.

Relief granted under Section 10(l) extends, by the terms of the statute, until there has been a "final adjudication of the Board" on the merits. There has been no such adjudication here either by the Board or even by the General Counsel. While the Regional Director, on December 12, 1969, executed a unilateral settlement agreement with the Respondent Union, the terms of the agreement were unac-

ceptable to the charging parties who, on January 22, 1970, filed their appeal of this action with the General Counsel of the Board. The General Counsel denied the appeal on March 25, 1970. On April 16, 1970 the charging parties filed a further appeal with the Board itself. The Board has not yet acted on this appeal. Accordingly, there is not now, nor has there been at any prior time in this case, any "final adjudication of the Board" which would terminate proceedings under Section 10(l). Moreover, the injunction provisions of Section 10(l) even now continue to constitute the sole effective relief available to the charging parties should the Respondent Union seek to resume its unlawful picketing, as it may determine to do at any time for any reason it deem compelling. Under these circumstances, and as the charges would remain viable and pending, the conclusion that the instant appeal is moot is not correct.

(2) Settlement of the Underlying Dispute Which Gave Rise to the Unlawful Conduct Does Not Render the Case Moot.

Decisions of this Court, as well as of the Board itself, hold that the settlement of the underlying dispute during the process of litigation does not render cases moot charging the commission of related unfair labor practices.

This conclusion was reached, for example, by this Court in *Local 1976 United Brotherhood of Carpenters and Joiners, et al.* v. *N. L. R. B.*, 357 U. S. 93, a case in which a union had engaged in an unlawful secondary boycott, had ceased such conduct subsequent to the filing of charges against them but prior to the issuance of a complaint by the Board's General Counsel, and *had settled the dispute by entering into a collective bargaining agreement containing an explicit pledge not to resume striking.*

Notwithstanding such a settlement, which not only dis-

posed of the underlying dispute but also contained a pledge to refrain from precisely that conduct which had been claimed to be unlawful, this Court held that "the controversy was not rendered moot"; there always remained a possibility of a resumption of unlawful conduct despite these undertakings so that an adjudication of the parties' rights and duties was neither inappropriate nor superfluous.

The Board itself has recently taken a similar view where unfair labor practices have been discontinued and the underlying dispute has been settled in the course of litigation. In *Allied Industrial Workers of America,* 174 NLRB No. 61 (1969), a union discontinued its unlawful secondary picketing and executed a collective bargaining agreement with the employer subsequent to the Trial Examiner's finding that unfair labor practices had been committed. The Union and the employer jointly sought the withdrawal of proceedings prior to the Board's consideration of the Trial Examiner's decision *on the ground that the matter had become settled and moot.* In opposing such withdrawal, the Board's General Counsel argued that the violations which were committed were of a "serious and continuing nature," and that the execution of a labor agreement neither dissipated the effects of the unfair labor practice charges nor obviated the need for a remedial order. The Board agreed with its General Counsel and denied the request to withdraw the charges. Surely, if the dispute in that case was not to be considered moot when even the aggrieved employer sought to terminate proceedings, then *a fortiori* it is not moot in the instant proceeding where the charging parties have opposed such a termination.[6]

6. In further contrast to the Board's contention that the instant case is moot is the position which the Board has taken before this Court in *NLRB* v. *Raytheon Co., et al.* (No. 440), currently awaiting decision. *Raytheon* involved a situation in which a representation election was set aside due to the employer's unfair

(3) Mootness Cannot Be Asserted So as to Deny Judicial Review of Short-Term Orders Which Are Capable of Repetition and Which Constitute Precedent in Future Similar Instances.

Pursuant to the terms of Section 10(l), relief afforded to aggrieved victims of unlawful pickets, strikes or boycotts is short-term in nature, extending only until the Board's "final adjudication" of the merits of the dispute. As measured by the present case, the duration of such relief—assuming no prior administrative or private settlement of the dispute—is approximately six months. In practical terms the duration of any such relief is likely to be shorter still, since the very nature of the economic pressures created by illegal strikes and boycotts encourages early "voluntary" settlement.

Under such circumstances, it would be virtually impossible ever to bring to an appellate court a case involving charges of judicial malfunction concerning or arising out of the granting or denying of injunctive relief; all such cases would become "moot" as they travelled their way through all the time-consuming stages of the judicial process which arrives, after the issuance of the Board's decision, in the appellate courts. Yet each error committed below becomes precedent to be used against the interests of other litigants who will be similarly unable to obtain review of their own "mooted" appeals.

Under the circumstances described, this Court has declared its refusal to apply the doctrine of mootness. In *Southern Pacific Terminal Company* v. *Interstate Com-*

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labor practices. Thereafter the employer's unlawful conduct ceased and a second and valid election was conducted. Notwithstanding the cessation of the unlawful conduct and the subsequent holding of a valid election, the Board sought to obtain judicial enforcement of its order barring the discontinued conduct in connection with the first election.

merce Commission, et al., 219 U. S. 498, 515-6, the appellant sought to have declared illegal an order of the Interstate Commerce Commission, which was of limited duration and which had expired by its own terms while pending appeal. The Commission defended on the ground that the case had become moot. This Court held that the doctrine of mootness does not apply to such situations, in which public rights and interests are involved and questions of law are presented, whose resolution "might serve to guide the municipal body when again called upon to act in the matter". The Court's extended rationale of its decision in *Southern Pacific* applies equally here:

> "In the case at bar the order to the Commission may to some extent (the exact extent it is unnecessary to define) be the basis of further proceedings. But there is a broader consideration. The questions involved in the orders of the Interstate Commerce Commission are usually continuing (as are manifestly those in the case at bar) and their consideration ought not to be, as they might be, defeated, by short-term orders, capable of repetition, yet evading review, and at one time the Government and at another time the carriers have their rights determined by the Commission without a chance of redress.[7]

(4) The Public Interest in the Clarification of Charging Parties' Appellate Rights Precludes a Finding That the Issue Is Moot.

The public has a substantial and legitimate interest in the development and clarification of rules and procedures adopted and employed on their behalf, including the creation of precedent which gives definiteness to the statutes

7. The continuing vitality of the doctrine of the *Southern Pacific Terminal* case is evidenced by its recent application by this Court in *Moore* v. *Ogilvie*, 394 U. S. 814, 816 (1969). See also *Division 1287 of the Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America* v. *State of Missouri*, 374 U. S. 74, reh. den., 375 U. S. 870.

which guide their conduct and describe or limit their rights. *United States* v. *Trans-Missouri Freight Association,* 166 U. S. 290. The importance of that interest should supersede technical questions concerning mootness where, as here, the presence of the Board, functioning as an active litigant, assures that an adequate presentation of all issues will be made in the course of clarifying the statute's meaning.

> "Not easy to weight, [the public interest in an adjudication on the merits] has seemed to some courts so pressing . . . as to justify a decision on the merits despite the fact that the decision could have no substantial effect on the parties who originally raised the question and that its usefulness would, as a result, be largely confined to the creation of precedent." (Citations omitted.) (Note, *"Moot" Administrative Orders,* 53 Harv. L. Rev. 628, 630 (1940).

Whenever an inquiry into the provisions of a statute raises serious questions of procedural fairness, the public interest in its prompt resolution *a fortiori* requires a decision on the merits irrespective of the effect or non-effect of that decision on the litigants (5 Am. Jur. 2d, *Appeal and Error,* §§ 762-765). In the instant case petitioners seek this Court's agreement that the refusal to permit charging parties fully to participate in the district court and to appeal adverse district court rulings and decisions when the Board refused to do so violated their statutory rights. Petitioners claim to have been deprived of what Mr. Justice Brandeis described as basic to the proper functioning of the judicial process:

> "The supremacy of law demands that there shall be opportunity to have some court decide whether an erroneous rule of law was applied; and whether the proceeding in which facts were adjudicated was conducted regularly." (*St. Joseph Stock Yards Co.* v. *United States,* 298 U. S. 38, 84 (concurring opinion).)

Accordingly, in the face of the existence of such issues here, together with the general, legitimate and paramount public interest in the clear and proper unfolding of the requirements of the statute, this appeal should not have been held to be moot; the court below should have addressed itself to the merits of the appeal and this Court is asked to do so directly.

CONCLUSION.

For the foregoing reasons, it is urged that this petition for writ of certiorari before judgment on the merits be granted.

Respectfully submitted,

JERRY KRONENBERG,
111 West Washington Street,
Suite 2144,
Chicago, Illinois 60602,
Attorney for Petitioners.

Of Counsel:
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APPENDIX A.

UNITED STATES COURT OF APPEALS
For the Third Circuit.

No. 17907

BERNARD SAMOFF, REGIONAL DIRECTOR OF THE FOURTH REGION OF THE NATIONAL LABOR RELATIONS BOARD, FOR AND ON BEHALF OF THE NATIONAL LABOR RELATIONS BOARD,

vs.

INTERNATIONAL ASSOCIATION OF MACHINISTS DISTRICT LODGE NO. 1.

TERMINAL FREIGHT COOPERATIVE ASSOCIATION, (CHARGING PARTY),

Appellant.

No. 17910

BERNARD SAMOFF, REGIONAL DIRECTOR OF THE FOURTH REGION OF THE NATIONAL LABOR RELATIONS BOARD, FOR AND ON BEHALF OF THE NATIONAL LABOR RELATIONS BOARD,

vs.

INTERNATIONAL ASSOCIATION OF MACHINISTS DISTRICT LODGE NO. 1.

TERMINAL FREIGHT HANDLING CO., (CHARGING PARTY),

Appellant.

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

Argued October 24, 1969.

Before KALODNER, STALEY and FREEDMAN, *Circuit Judges.*

(Filed December 18, 1969.)

PER CURIAM.

Appellants, Terminal Freight Cooperative Association and Terminal Freight Handling Co., charging parties before the National Labor Relations Board, objected to the approval by the district court of a stipulation between appellees, International Association of Machinists, District Lodge No. 1 (hereinafter "union"), and Bernard Samoff, Regional Director of the Fourth Region of the National Labor Relations Board (hereinafter "Board"). On April 24, 1969, the Board had petitioned the United States District Court for the Eastern District of Pennsylvania for an order enjoining the union from engaging in certain picketing, violative of the National Labor Relations Act, 29 U. S. C. § 158, which proscribes secondary boycotts. The petition, brought pursuant to Section 10 (*l*) of the Act as amended, 29 U. S. C. § 160(*l*), alleged in substance that the union, in furtherance of a labor dispute with Sears, Roebuck & Co., had picketed a freight terminal operated by appellant Terminal Freight Handling Co. in order to force said appellant to cease doing business with Sears.

In lieu of an injunction, the union entered into a stipulation with the Board to cease and desist from engaging in the conduct complained of in the petition. These appeals from the district court's approval of the stipulation argue that the charging parties were not permitted to participate in the proceedings giving rise to the stipulation and that the stipulation affords inadequate relief.

Each appellee moved to dismiss the appeals. The Board argued a lack of standing in the charging parties to

prosecute the appeals. The union asserted that the issue was moot. On May 26, 1969, a panel of this court considered both motions and ordered them continued until argument on the merits. The merits have been argued and an uncontradicted affidavit has been filed by the Business Representative of the union. It states that the underlying labor dispute has been settled by the execution of a collective bargaining agreement between the union and Sears, Roebuck & Co. The court is now of the opinion that the appeals are clearly moot.

The appeals will therefore be dismissed.

A True Copy:

Teste:

.....

Clerk of the United States Court of Appeals for the Third Circuit.

APPENDIX B.

UNITED STATES DISTRICT COURT.
* * (Caption—69-892) * *

STIPULATION.

It Is Hereby Stipulated and Agreed by and between the attorneys for the respective parties to this proceeding, subject to the approval of the Court, that:

1. Pending final disposition of the matters involved herein pending before the National Labor Relations Board (herein called the Board), respondent, its officers, representatives, agents, servants, attorneys and all members and persons acting in concert with it or them, will not;

(a) Picket at or in the vicinity of Terminal Freight Handling Co. at "B" and Venango Streets, Philadelphia, Pennsylvania; or

(b) In any manner or by any means, including picketing orders, directions, instructions, requests, or appeals, however given, made or imparted, or by any like or related acts or conduct, or by permitting any such to remain in existence or effect, engage in, or induce or encourage any individual employed by Terminal Freight Handling Co., Joseph G. Tropiano, Inc., or by any carriers doing business at Terminal Freight Handling Co., Joseph G. Tropiano, Inc., or by any carriers doing business at Terminal Freight Handling Co.'s Philadelphia terminal to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any service, or in any manner or by any means, threaten, coerce, or restrain Terminal Freight Cooperative Association, Terminal Freight Handling Co., Joseph G.

Tropiano, Inc., or any carriers doing business at Terminal Freight Handling Co.'s Philadelphia terminal, where in either case an object thereof is to force or require Terminal Freight Cooperative Association, Terminal Freight Handling Co., Joseph G. Tropiano, Inc., or any other person to cease using, handling, transporting or otherwise dealing in the products of, or to cease doing business with Sears, Roebuck and Co.

2. In the event that respondent violates any of the provisions of Paragraph 1, above, then upon the filing of an affidavit by petitioner to that effect, a copy of which petitioner will serve on respondent or its attorney, the court may, without further notice to respondent, reinstate the temporary restraining order entered April 24, 1969, such reinstated temporary restraining order to be effective in accordance with applicable law.

3. This case shall meanwhile be continued without date and remain on the docket of this court. Upon compliance by respondent with its obligation undertaken hereunder, and upon the final disposition by the Board of the matters pending before it as aforesaid, the petitioner shall cause this proceeding to be dismissed.

4. The making and execution of this Stipulation shall not be construed as an admission that respondent has engaged in the unfair labor practices alleged in the petition.

Dated at Philadelphia, Pennsylvania, this 29th day of April, 1969.

WILLIAM J. DAVIS,
Attorney for Petitioner.

RICHARD H. MARKOWITZ,
Attorney for Respondent.

Approved and so ordered this 29th day of April, 1969.

RALPH C. BODY,
United States District Judge.

UNITED STATES DISTRICT COURT.
• • (Caption—69-892) • •

ORDER.

The Order issued this 29th day of April, 1969, approving the Stipulation of the Petitioner and Respondent is hereby modified as follows:

> The Stipulation of Petitioner and Respondent as modified and initialed by them is hereby approved over objection of Terminal Freight Cooperative Association and Terminal Freight Handling Co., Charging Parties, who, having entered their appearances by counsel but who have not moved to intervene, do not constitute parties and lack standing to be heard on their objections.

RALPH C. BODY,
United States District Judge.

APPENDIX C.

UNITED STATES DISTRICT COURT.
• • (Caption—69-892) • •

TEMPORARY RESTRAINING ORDER AND ORDER TO SHOW CAUSE.

The petition of Bernard Samoff, Regional Director of the Fourth Region of the National Labor Relations Board, having been filed pursuant to Section 10(1) of the National Labor Relations Act, as amended, praying for a temporary restraining order against respondent, International Association of Machinists, District Lodge No. 1, and for an order directing said respondent to show cause why a temporary injunction should not be granted as prayed for in said petition; the petition being verified and supported by affidavits and exhibit; and

It Appearing to the Court from and verified petition, affidavits and exhibit that:

1. A charge has been filed with the National Labor Relations Board charging the above-named respondent with violations of Section 8(b)(4)(i)(ii) (B) of the National Labor Relations Act; and

2. There is reasonable cause to believe that the charge is true and that respondent has engaged in, and is engaging in, acts and conduct in violation of Section 8(b)(4)(i)(ii)(B) of the National Labor Relations Act, as amended, affecting commerce within the meaning of Sections 2(6) and (7) of said Act; and

3. The acts and conduct of respondent aforesaid have and are preventing Terminal Freight Handling Co. from making trans-shipments of merchandise to the forty-six

(46) member companies of Terminal Freight Cooperative Association and have resulted in a diminution in the freight handled on a daily basis at the Philadelphia terminal from 300,000 pounds to 20,000 pounds. Members of the Association, including Boeing Company, General Dynamics Corporation and Northrup Corporation, obtain materials, components, parts and assemblies which are essential to their production from various suppliers and manufacturers in the Eastern part of the country, who ship such materials through the Philadelphia terminal of Terminal Freight Handling Co. Further delay in the shipment of such materials from the Philadelphia terminal will cause substantial and irreparable injury to the aforesaid companies as well as to the National Defense since said companies are engaged in National Defense contracts and further delay will prevent them from fulfilling their contractual commitments. In addition, continued picketing at the Philadelphia terminal will delay or prevent shipment and delivery of a substantial amount of seasonal consumer goods to other members of the Association, with a resulting loss of business particularly from retail customers; and

4. There is imminent danger that substantial and irreparable injury will unavoidably result to Terminal Freight Cooperative Association and Terminal Freight Handling Co., charging parties in the proceedings before the National Labor Relations Board, to employees and other persons not involved in the dispute herein, and to the policies of the National Labor Relations Act, as amended, if respondent is permitted to continue its aforesaid acts and conduct pending a hearing on the petition filed herein;

Now Therefore, Upon The Above, It Is Ordered that respondent International Association of Machinists, District Lodge No. 1, its officers, representatives, agents, servants, employees, attorneys, and all members and persons acting in concert or participation with them, or any of

them, be, and they hereby are, enjoined and restrained until April 29, 1969, at 2 P. M., and not longer without the further order of this Court, from:

(a) Picketing at or in the vicinity of Terminal Freight Handling Co. at "B" and Venango Streets, Philadelphia, Pennsylvania; or

(b) In any manner or by any means, including picketing, orders, directions, instructions, requests, or appeals, however given, made or imparted, or by any like or related acts or conduct, or by permitting any such to remain in existence or effect, engaging in, or inducing or encouraging any individual employed by Terminal Freight Handling Co., Joseph G. Tropiano, Inc., or by any other person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any service, or in any manner or by any means, threatening, coercing, or restraining Terminal Freight Cooperative Association, Terminal Freight Handling Co., Joseph G. Tropiano, Inc., or any other person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is to force or require Terminal Freight Cooperative Association, Terminal Freight Handling Co., Joseph G. Tropiano, Inc., or any other person to cease using, handling, transporting or otherwise dealing in the products of, or to cease doing business with Sears, Roebuck and Co.

It Is Further Ordered that Respondent, International Association of Machinists, District Lodge No. 1, appear before this Court at the United States Courthouse, Philadelphia, Pennsylvania, on the 29th day of April, 1969, at 2 P.M., or as soon thereafter as counsel can be heard, and then and there show cause, if any there be, why,

pending the final disposition of the matters involved pending before the National Labor Relations Board, respondent, its officers, representatives, agents, servants, employees, attorneys, and all members and persons acting in concert or participation with it or them should not be enjoined and restrained as prayed in said petition; and

It Is Further Ordered that respondent International Association of Machinists, District Lodge No. 1, file an answer to the allegations of said petition with the Clerk of this Court, and serve a copy thereof upon petitioner at his office located at 1700 Bankers Securities Building, Walnut and Juniper Streets, Philadelphia, Pennsylvania, on or before the 28th day of April, 1969; and

It Is Further Ordered that service of a copy of this order, together with a copy of the petition, affidavits and exhibit upon which it is issued, be fortwith made by a United States Marshal upon respondent International Association of Machinists, District Lodge No. 1, and upon Terminal Freight Cooperative Association and Terminal Freight Handling Co., the charging parties before said Board, in any manner provided in the Rules of Civil Procedure for the United States District Courts, or by registered mail, and that proof of such service be filed herein.

Done at Philadelphia, Pennsylvania, this 24th day of April, 1969.

RALPH C. BODY,
United States District Judge.

APPENDIX D.

UNITED STATES DISTRICT COURT
For the Eastern District of Pennsylvania.
• • (Caption—69-962) • •

ENTRY OF APPEARANCE.

To the Clerk:

Kindly enter my appearance and the appearance of Jerry Kronenberg, Esquire and Lawrence D. Ehrlich, Esquire on behalf of Terminal Freight Handling Co. and Terminal Freight Cooperative Association, Charging Parties.

BOROVSKY AND EHRLICH,
PELINO & WASSERSTROM,
By John W. Pelino,
Attorneys for Terminal Freight Handling Co. and Terminal Freight Cooperative Association, Charging Parties.

Date: April 28, 1969.

APPENDIX E.

UNITED STATES DISTRICT COURT
For the Eastern District of Pennsylvania.

BERNARD SAMOFF, Regional Director of the Fourth Region of the National Labor Relations Board, for and on behalf of the NATIONAL LABOR RELATIONS BOARD,
Petitioner,
vs.
INTERNATIONAL ASSOCIATION OF MACHINISTS, DISTRICT LODGE No. 1,
Respondent.

Civil No. 69-892.

PETITION FOR INJUNCTION UNDER SECTION 10(1) OF THE NATIONAL LABOR RELATIONS ACT, AS AMENDED.

To the Honorable, the Judges of the United States District Court for the Eastern District of Pennsylvania:

Comes now Bernard Samoff, Regional Director of the Fourth Region of the National Labor Relations Board (herein called the Board) and petitions this Court, for and on behalf of the Board, pursuant to Section 10(1) of the National Labor Relations Act, as amended (61 Stat. 149; 73 Stat. 544; 29 U. S. C. Sec. 160(1); herein called the Act), for appropriate injunctive relief pending the final disposition of the matters involved pending before the Board on a charge alleging that respondent has engaged in, and is engaging in, acts and conduct in violation of Section 8(b)(4)(i)(ii), subparagraph (B), of the Act. In support thereof, petitioner respectfully shows as follows:

1. Petitioner is Regional Director of the Fourth Region of the Board, an agency of the United States, and files this petition for and on behalf of the Board.

2. Jurisdiction of this Court is invoked pursuant to Section 10(l) of the Act.

3. On or about April 18, 1969, Terminal Freight Cooperative Association and Terminal Freight Handling Co., (herein called Association and Handling Co., respectively), pursuant to the provisions of the Act, filed a charge with the Board alleging that International Association of Machinists, District Lodge No. 1 (herein called respondent), a labor organization, has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(b)(4)(i)(ii), subparagraph (B), of the Act. A copy of said charge is attached hereto as Exhibit 1 and made a part hereof.

4. The aforesaid charge was referred to petitioner as Regional Director of the Fourth Region of the Board.

5. Upon the basis of the following, petitioner has reasonable cause to believe that said charge is true, insofar as it alleges that respondent has violated Section 8(b)(4)(i) and (ii), subparagraph (B) of the Act, and that a complaint of the Board based on said charge should issue against respondent pursuant to Section 10(b) of the Act. More particularly, petitioner has reasonable cause to believe, and believes, that respondent is a labor organization within the meaning of Section 2(5), 8(b) and 10(l) of the Act, and that said respondent has engaged in, and is engaging in, acts and conduct in violation of Section 8(b) 4(i) and (ii), subparagraph (B) of the Act, affecting commerce within the meaning of Sections 2(6) and (7) of the Act, as follows:

(a) Respondent, an unincorporated association, is an organization in which employees participate and which

exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

(b) Respondent maintains its principal office and place of business at 3901 Kensington Avenue, Philadelphia, Pennsylvania. At all times material herein, respondent has been engaged within this judicial district in transacting business and in promoting and protecting the interests of its employee members.

(c) Association is a non-profit shipper association consisting of forty-six (46) companies, including Boeing Company, Broadway-Hale Stores, North American Rockwell Corporation, Whirlpool Company, General Dynamics Corporation and Sears, Roebuck and Co., which receives less-than-carload and less-than-truckload shipments, consolidates such shipments into carload lots and reships such goods to members' plants at various location throughout the United States. Members of the Association, individually and collectively, have annual gross sales in excess of $500,000 and each receives and ships goods valued at in excess of $50,000 in interstate commerce throughout the several States of the United States.

(d) Handling Co. is a non-profit Delaware corporation engaged in the handling, consolidation and trans-shipment of freight as manager of the Association. It operates thirty-six (36) terminal facilities in twenty-four (24) States and the District of Columbia, including a terminal at "B" and Venango Streets, Philadelphia, Pennsylvania. It has annual receipts of more than $1,000,000 derived from services supplied in connection with the movement of freight in interstate commerce.

(e) Joseph G. Tropiano, Inc., (herein called Tropiano), is a labor contracting firm under contract to Handling Co.

to provide necessary freight handling services at the Philadelphia terminal.

(f) Since on or about April 16, 1969, respondent has been engaged in a labor dispute with Sears, Roebuck and Co.

(g) At no time material herein has respondent had any labor dispute with Association, Handling Co. or Tropiano.

(h) In furtherance of the aforesaid dispute with Sears, respondent, since on or about April 16, 1969, has picketed at the Handling Co. terminal in Philadelphia.

(i) By the acts and conduct set forth in subparagraph (h), above, respondent has engaged in, and has induced and encouraged individuals employed by Handling Co., Tropiano and by other persons engaged in commerce or in industries affecting commerce, to engage in, strikes or refusals in the course of their employment to use, manufacture, process, transport or otherwise handle or work on goods, articles, materials, or commodities, or to perform services.

(j) By the acts and conduct set forth in subparagraph (h), above, respondent has threatened, coerced and restrained Association, Handling Co., Tropiano and other persons engaged in commerce or in industries affecting commerce.

(k) An object of the acts and conduct of respondent set forth in subparagraphs (h), (i) and (j), above, was and is to force or require Association, Handling Co., Tropiano and other persons to cease using, selling, handling, transporting, or otherwise dealing in the products of, or to cease doing business with Sears, Roebuck and Co.

6. It may fairly be anticipated that, unless enjoined, respondent will continue or repeat the acts and conduct set forth in paragraph 5, subparagraphs (h), (i), (j), and (k),

above, or similar or like acts and conduct in violation of Section 8(b)(4)(i) and (ii), subparagraph (B) of the Act. It is therefore essential, appropriate, just and proper, for the purpose of effectuating the policies of the Act, and in accordance with the provisions of Section 10(l) thereof, that, pending final disposition of the matters involved herein pending before the Board, respondent be enjoined and restrained from the commission of the acts and conduct above alleged, similar acts and conduct, or repetitions thereof.

7. Upon information and belief, as more fully appears from the affidavits attached hereto and made a part hereof, there is imminent danger that, before a hearing can be held on this petition, immediate, substantial and irreparable injury will unavoidably result to the policies of the Act, to the charging parties, to employees and other persons not involved in the dispute herein, to the National Defense and to the public interest, from a continuation of respondent's unlawful conduct.

Wherefore, petitioner prays:

1. That the Court issue a temporary restraining order forthwith enjoining and restraining respondent, its officers, agents, representatives, servants, employees, attorneys, and all members and persons acting in concert or participation with it or them, for a period of five (5) days but not longer without the further order of the Court from:

(a) Picketing at or in the vicinity of Terminal Freight Handling Co. at "B" and Venango Streets, Philadelphia, Pennsylvania; or

(b) In any manner or by any means, including picketing, orders, directions, instructions, requests, or appeals, however given, made or imparted, or by any like or related acts or conduct, or by permitting any such to remain in existence or effect, engaging in, or inducing or encourag-

ing any individual employed by Handling Co., Tropiano, or by any other person engaged in commerce or in an industry affecting commerce, to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any service, or any manner or by any means threatening, coercing, or restraining Association, Handling Co., Tropiano, or any other person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is to force or require Association, Handling Co., Tropiano, or any other person, to cease using, handling, transporting or otherwise dealing in the products of, or to cease doing business with Sears, Roebuck and Co.

2. That the Court issue an order directing respondent to appear before this Court, at a time and place to be fixed by the Court, and show cause, if any there be, why an injunction should not issue enjoining and restraining respondent, its officers, agents, representatives, servants, employees, attorneys, and all members and persons acting in concert or participation with it or them, pending the final disposition of the matters involved pending before the Board, in the manner hereinabove set forth.

3. That upon return of said order to show cause, the Court issue an order enjoining and restraining respondent in the manner set forth above.

4. That the Court grant such further and other relief as may be just and proper.

Dated at Philadelphia, Pennsylvania this 24th day of April, 1969.

BERNARD SAMOFF,

BERNARD SAMOFF, *Regional Director for the Fourth Region of the National Labor Relations Board.*

ARNOLD ORDMAN,
General Counsel,
DOMINICK L. MANOLI,
Associate General Counsel,
JULIUS G. SEROT,
Assistant General Counsel,
LEONARD LEVENTHAL,
Regional Attorney, Region 4,
WILLIAM J. DAVIS,
WILLIAM J. DAVIS, *Attorney,*
National Labor Relations Board,
1700 Bankers Securities Building,
Juniper and Walnut Streets,
Philadelphia, Pennsylvania 19107,
Telephone No. 597-7601.

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Form NLRB-508 (5-68)

Form Approved
Budget Bureau no. 64-R003.11

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

CHARGE AGAINST LABOR ORGANIZATION OR ITS AGENTS

INSTRUCTIONS: File an original and 3 copies of this charge and an additional copy for each organization, each local and each individual named in item 1 with the NLRB regional director for the region in which the alleged unfair labor practice occurred or is occurring.

DO NOT WRITE IN THIS SPACE

CASE NO. 4-CC-517

DATE FILED 4/18/69

1. LABOR ORGANIZATION OR ITS AGENTS AGAINST WHICH CHARGE IS BROUGHT

a. NAME

INTERNATIONAL ASSOCIATION OF MACHINISTS, DISTRICT LODGE NO. 1

b. ADDRESS (Street, City, State and ZIP Code)

3901-03 Kensington Avenue
Philadelphia, Pennsylvania 19122

2. The above-named organization(s) or its agents has (have) engaged in and is (are) engaging in unfair labor practices within the meaning of section 8(b) subsection(s) 8(b)(4)(i)(ii) (List subdivisions) of the National Labor Relations Act, and these unfair labor practices are unfair labor practices affecting commerce within the meaning of the Act.

3. BASIS OF THE CHARGE (Be specific as to facts, names, addresses, plants involved, dates, places, etc.)

The above labor organization and its agents, beginning on April 16th, 1969, and continuing to the present, (1) have engaged in, induced and encouraged individuals employed by Terminal Freight Cooperative Association, Terminal Freight Handling Co. and Joe Tropiano, Inc., persons engaged in commerce and in industries affecting commerce, and other persons so engaged, to engage in a strike and a refusal in the course of their employment to use, process, transport or otherwise handle or work on any goods, articles, materials or commodities shipped to or intended to be shipped to or received by or intended to be received by Boeing Company, Broadway-Hale Stores, North American Rockwell Corporation, Federated Department Stores, Whirlpool Company, all members of Terminal Freight Cooperative Association and other members of said Association, or to perform any services for such members; and (ii) have since April 16th, 1969 and continuing to the present, threatened, coerced and restrained persons, including those named in (i) above, all of whom are persons engaged in commerce or in industries affecting commerce, with the object of: forcing and requiring the employees of Terminal Freight Handling Co. and Joe Tropiano, Inc. to cease using, handling, transporting or otherwise dealing in the products of Sears, Roebuck and Co. and of other producers, processors or manufacturers, including the persons named in (i) above, and to cease doing business with Sears, Roebuck and Co. and such other persons.

4. NAME OF EMPLOYER TERMINAL FREIGHT COOPERATIVE ASSOCIATION
TERMINAL FREIGHT HANDLING CO.

5. LOCATION OF PLANT INVOLVED (Street, City, State, and ZIP Code)

"B" and Venango Streets, Philadelphia, Pa.

6. TYPE OF ESTABLISHMENT (Factory, mine, wholesaler, etc.)	7. IDENTIFY PRINCIPAL PRODUCT OR SERVICE	8. NO. OF WORKERS EMPLOYED
Warehouse	General Merchandise	40

9. FULL NAME OF PARTY FILING CHARGE

TERMINAL FREIGHT COOPERATIVE ASSOCIATION and TERMINAL FREIGHT HANDLING CO.

9. ADDRESS OF PARTY FILING CHARGE (Street, City, State and ZIP Code)	10. TEL. NO.
"B" and Venango Streets, Philadelphia, Pa.	GA 6-6850

11. DECLARATION

I DECLARE THAT I HAVE READ THE ABOVE CHARGE AND THAT THE STATEMENTS THEREIN ARE TRUE TO THE BEST OF MY KNOWLEDGE OR BELIEF.

BY _____
(Signature of representative or person making charge)

April 18, 1969
(Date)

Manager
Terminal Freight Handling Co.
(Title or office, if any)

WILLFULLY FALSE STATEMENTS ON THIS CHARGE CAN BE PUNISHED BY FINE AND IMPRISONMENT (U. S. CODE, TITLE 18, SECTION 1001)

EXHIBIT "A"

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COMMONWEALTH OF PENNSYLVANIA,
COUNTY OF PHILADELPHIA. } ss.

AFFIDAVIT IN SUPPORT OF REQUEST FOR TEMPORARY RESTRAINING ORDER.

I, Victor J. Romendio, being duly sworn according to law, depose and say that I am the Manager of the Philadelphia Terminal of Terminal Freight Handling Company located at "B" and Venango Streets, Philadelphia, Pennsylvania. Terminal Freight Handling Company is a Delaware corporation, with 37 terminals in 24 States engaged in handling and transshipment of freight for a cooperative association of approximately 46 members, including, among others: Boeing Company, Broadway-Hale Stores, North American Rockwell Corporation, Federated Department Stores, North American Aviation, General Dynamics, Sears, Roebuck and Co., and Whirlpool Company.

The Philadelphia terminal of Terminal Freight Handling Company employs approximately 20 clerical employees and engages the services of Joe Tropiano, Inc. for actual freight handling. Joe Tropiano, Inc. has approximately 45 employees who perform such freight handling services.

Members of the Association direct shippers in the Middle Atlantic States to deliver consignments to our terminal for forwarding to their ultimate destination. For example, a consignment of material from a Pittsburgh vendor to Boeing's Seattle Plant is delivered to our terminal on Boeing's order and then is transhipped in a consolidated load with the consignments to other Association members in the Northwest United States.

The Philadelphia Terminal transships approximately 2,000,000 pounds of freight per week in this manner to the 46 members of the Association in almost every state of

the Union. The average dollar value of these weekly transshipments is in excess of $3,000,000. In addition, Terminal Freight Handling Company consolidates inbound shipments of approximately 1,000,000 pounds per week for Association members who are receiving consignments in the Middle Atlantic States from points outside the Middle Atlantic States. For example, an Association member may direct shippers in California, Missouri, Arkansas, Texas and Florida to deliver less than truckload or carload shipments to us for consolidation and transshipment to the Association member's plant in Baltimore.

As Manager, I am responsible for the day-to-day operation of the Philadelphia Terminal. I hire all employees, set the rates of pay, assign duties and manage the entire Philadelphia operation. I report to Henry L. Bateman, the National General Manager of Terminal Freight Handling, Inc. Mr. Bateman works the home office of Terminal Freight Handling, Inc. is Skokie, Illinois.

On April 16, 1969, at approximately 6:30 A. M., members, officers or agents of International Association of Machinists, District Lodge No. 1, commenced picketing the entrances, exits and approaches to the Philadelphia terminal. The pickets have stopped all incoming vehicles and prevented most of them from entering the premises, thereby preventing us from making transshipments of merchandise to our members which, in many cases, is deemed critical in their manufacturing or sales operations. Companies like Boeing schedule production on the basis of receipt of merchandise transshipped by us. Other member companies like Broadway-Hale Stores are awaiting delivery of high fashion merchandise and of seasonal products, such as garden tools, etc. Consignments to some of the members of Terminal Freight Cooperative Association are not arriving and we are unable to locate certain shipments, which have been deemed critical by the consignees.

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Since shipments to our members are consigned to Terminal Freight Handling, Inc., non-delivery to us results in shipments being held by carriers who cannot forward them or in a return to shipper with all the attendant loss delay and misrouting. If interference with our service continues, it will result in loss of production and sales to our members and cause a permanent decline in our business.

On the first day of picketing, April 16, 1969, I approached the pickets at approximately 8:30 to find out why they were picketing. I approached the pickets who were wearing signs showing the name of their union, with the words "strike" and "Sears". I asked why they were picketing the Terminal, and one of the pickets said that they were appliance service men who work for Sears, Roebuck and Co. and that they are on strike. I checked with a representative of Sears, Roebuck and Co., who informed me that the strike is by appliance service men who perform installation and repairs of appliances sold in the Philadelphia area by Sears' local stores.

Terminal Freight Handling Company does not engage in appliance deliveries or repairs and Sears, Roebuck and Co. does not receive or make appliance shipments through us except on very rare occasion, when a single sample model is transshipped through us. We do not perform any of the work for Sears, Roebuck and Co. which would be performed by appliance repair or installation personnel.

I understand that the pickets are employed at the Sears Service Appliance Center on West Allegheny Avenue in Philadelphia, approximately one and one-half miles from our terminal. We make no shipments to that Sears location and we receive no merchandise from that location.

When I explained to the pickets that we are not involved in any way in their dispute and that we handle merchandise for 46 companies, of which Sears, Roebuck and Co. is only

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one, they said they were going to picket and to stop vehicles from entering or leaving the premises if they could.

The average daily volume through our terminal is over 300,000 pounds per day. Since the picketing started, the average daily volume has declined to 20,000 pounds. I have been informed that several of the Association's members who are defense contractors are expecting shipments through our terminal of materials critical to the completion of the defense contracts. Because of the pickets and their prevention of deliveries to our terminal, I cannot locate the materials and I have no bills of lading or other shipping documents which would enable me to trace those shipments.

I have been informed that pickets or other representatives of the Machinists Union have also sought to induce employees of Terminal Freight Handling Company and of Joe Tropiano, Inc. to refuse to work and to go out on a sympathy strike with the pickets, and to stop handling any shipments to or from Sears, Roebuck and Co.

The foregoing statement is true and correct to the best of my knowledge, information and belief.

VICTOR J. ROMENDIO.

Sworn to and subscribed before me this 21st day of April, 1969.

JOY L. HOLMES,
Notary Public.

My Commission Expires: April 17, 1971.

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STATE OF WASHINGTON, }
COUNTY OF KING. } ss.

AFFIDAVIT.

Now comes Loia H. Coons, who under oath, deposes and says: I am the Traffic Manager for the Aerospace Group of the Boeing Company. My office is located at 4735 East Marginal Way South, Seattle, Washington. As Traffic Manager for the Aerospace Group, I am responsible for the movement of all material to and from all Boeing Company plants in the Aerospace Group. The Aerospace Group has plants located in Seattle, Washington, Kent, Washington, New Orleans, Louisiana, Huntsville, Alabama, Cocoa Beach, Florida, Vandenberg, California, Ogden, Utah, and other locales throughout the continental United States.

The Boeing Company also has various other divisions including The Commercial Airplane Division, which is headquartered at Renton, Washington, with plants located in Renton, Washington, Auburn, Washington, Kent, Washington, Seattle, Washington, and Everett, Washington.

The Boeing Company is now and has been since 1942 a member of the Terminal Freight Cooperative Association, which is composed of 46 Companies, including Boeing. I am a member of the Executive Committee of the Terminal Freight Cooperative Association. The Terminal Freight Cooperative Association is a non-profit shippers' association which receives less-than-carload and less-than-truckload shipments, consolidates these shipments into carload lots and reships such goods to members' plants at various destinations throughout the country.

This operation enables members to have better control of their shipments during movement by knowing at all times where given freight is during transit, and also creates a substantial freight savings for the members.

Terminal Freight Cooperative Association employs the Terminal Freight Handling Company, a not for profit corporation, to manage and operate the various Terminal facilities throughout the country Terminal Freight Handling Company, which is a wholly-owned subsidiary of Sears, Roebuck and Co., serves at the pleasure of the Executive Committee of Terminal Freight Cooperative Association. The managers and employees of Terminal Freight Handling Company report to and are responsible to the Executive Committee of Terminal Freight Cooperative Association. Members of the Cooperative Association and the Cooperative Association itself deal directly with Terminal Freight Handling Company, and do not deal directly with Sears, Roebuck and Co. Each member of the Cooperative Association, including Sears has only one vote with regard to any matter which is to be determined by or on behalf of the Cooperative Association. Sears, as well as every other member of the Cooperative Association, is subject to all rules and regulations of the Cooperative Association. Sears receives no management fees or priority, no discount or other compensations, and no special treatment by the Cooperative Association. It is treated in all regards exactly as all other members of the Cooperative Association. Any excess revenues which accrue to the Cooperative Association by virtue of its operations are annually distributed on a pro rata basis, dependent on tonnage, to each Cooperative Association member. Conversely, Association deficits are assessed against each Association member on the same pro rata basis.

The officers of the Cooperative Association are:

D. R. Macdonald, City Products Corporation—President

R. K. Herrman, Sears, Roebuck and Company—Vice President

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H. C. Brewer, American Biltrite Rubber Company
L. H. Coons, The Boeing Company
R. T. Longbotham, Van Waters and Rogers
G. K. Martin, Meier and Frank Company, Inc.
J. D. Masters, Broadway-Hale Stores, Inc.
J. V. Leonardo, Terminal Freight Handling Company
—Secretary

The Boeing Company is a prime contractor for the United States Department of Defense, and other Departments of the United States Government in the research, development, production and testing of missile defense systems including, but not limited to, the Minuteman Missile Defense System, the Advanced Minuteman Missile Defense System and the AGM Missile Defense System. Boeing's contracts with the Department of Defense concerning the Minuteman, Advanced Minuteman and AGM Missile Defense Systems each require that specific time targets for research, development, production and testing be met in each instance. Time is a critical factor to the compliance by Boeing with the terms and conditions of each of the above-described contracts.

Materials and equipment which are essential to Boeing's performance on its contracts with the United States Government for the various Missile Defense Systems described above are purchased by Boeing from various manufacturers located in the Eastern part of the United States. Boeing has title to all such material and equipment by virtue of the fact that these purchases are made F.O.B. at the vendors' plants. A substantial portion of the materials so purchased are routed by Boeing to the Terminal Freight Cooperative Association Terminal located in Philadelphia, Pennsylvania, where it is reshipped to the various Boeing plant described above. During January, February, and March of 1969, a representative period, the gross volume

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of shipments of materials and equipment belonging to The Boeing Company which passed through the Terminal Freight Cooperative Association, Philadelphia, Pennsylvania terminal was 165,000 pounds.

At present, 24 of Boeing's suppliers are shipping materials purchased by Boeing to the Philadelphia, Pennsylvania terminal. In addition to these 24 Companies, 720 other Boeing suppliers have standing instructions to ship goods purchased by Boeing to Boeing through that terminal. Any delays in the shipment or receipt of such materials and equipment would, of necessity, cause serious and irreparable damage to The Boeing Company and the Department of Defense by virtue of the fact that it would delay or preclude Boeing's ability to fulfill its contractual commitments to the Federal Government.

I have read the above and foregoing statement and swear that it is true and correct to the best of my knowledge and belief.

L. H. Coons,
Loia H. Coons.

Subscribed and sworn to before me this 21st day of April, 1969.

Frank P. Vane,
(Notary Public.)

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STATE OF CALIFORNIA,
COUNTY OF LOS ANGELES. } ss.

AFFIDAVIT OF JOHN G. REID.

John G. Reid, being first duly sworn deposes and says:

I am Chief of Traffic and Shipping for the Norair Division of Northrop Corporation. My business address is 2031 East Mariposa Street, El Segundo, California. My place of residence is 5416 Bayridge Road, Palos Verdes Peninsula, California.

Northrop Corporation is one of forty-five members of Terminal Freight Cooperative Association, a non-profit shippers' cooperative. Northrop Corporation uses eight terminals of Terminal Freight Cooperative Association, including the terminal located on Venango Street, Philadelphia, Pennsylvania.

Northrop Corporation, through its Norair Division, has contracts with the Department of Defense for the manufacture and assembly of two airplanes for the United States Air Force—the T-38 jet trainer and the F-5 jet fighter planes. These two airplanes are manufactured and assembled at Northrop Corporation's Hawthorne and Palmdale, California plants. These two airplanes are manufactured and assembled only by Northrop Corporation for delivery to the Department of Defense. The F-5 airplanes are deployed by the United States Air Force throughout the world, including South Viet Nam, free China, South Korea, Philippines, Ethiopia, Greece and Iran. Under these contracts, Northrop Corporation is required to manufacture twenty-five such airplanes each month. At the present time, Northrop Corporation is meeting its delivery schedules under such contracts.

Northrop Corporation obtains components for use in the

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manufacture and assembly of such airplanes from eastern manufacturers including, but not limited to, the Utica Division of Bendix Corporation, the Fluid Power Division of Bendix Corporation, the Electrical Components Division of Bendix Corporation, AMP Incorporated, American Cyanamid Company, Bloomingdale Department and others. The components supplied to Northrop Corporation by the above-described sub-contractors and others are delivered to the Philadelphia Terminal of Terminal Freight Cooperative Association, and from that terminal are forwarded to Northrop Corporation at its Hawthorne and Palmdale, California plants where the components are used in the manufacture and assembly of the T-38 and F-5 airplanes.

To my knowledge, at the present time there are components for the T-38 and F-5 airplanes which have been delivered to the Philadelphia Terminal of the Terminal Freight Cooperative Association by the above-described sub-contractors and others which have not been forwarded to Northrop Corporation at its Hawthorne and Palmdale, California plants. The records of the Philadelphia Terminal of the Terminal Freight Cooperative Association will indicate the exact number and nature of such components.

If such components of the T-38 and F-5 airplanes now located in the Philadelphia Terminal of the Terminal Freight Cooperative Association are not forwarded to the Northrop Corporation in the ordinary course of business, Northrop Corporation will be unable to meet its delivery schedules for the T-38 and F-5 airplanes.

If the delivery schedules for the T-38 and F-5 airplanes are not met, in addition to the substantial and irreparable injury to the Department of Defense and the United States Air Force, Northrop Corporation will suffer substantial and irreparable injury because it will be delinquent under

such contracts and liable for penalties, and its good will and reputation for prompt performance of its contracts will be greatly damaged.

JOHN G REID.

Subscribed and sworn to before me this 19th day of April, 1969.
(Seal)

PEARLE A. YUTZ,
Notary Public in and for the State of California.

My Commission expires September 19, 1970.

STATE OF CALIFORNIA,
COUNTY OF SAN DIEGO,
CITY OF SAN DIEGO. } ss.

AFFIDAVIT.

I, John C. Ruzich, being first duly sworn do state as follows:

1. I am the Traffic Supervisor at the Convair Division of General Dynamics Corporation located in San Diego, California. My responsibilities include the routing, tracing, expediting, and auditing of bills for all inbound and outbound freight and classifying of outbound freight. The shipments made from the various locations in the eastern part of the United States include various raw materials as well as nuts, bolts and other hardware through a spectrum of items to and including electronic parts and assemblies used in the manufacture of aerospace products. In addition, I am responsible for the preparation of all bills of lading, including Government Bills of Lading and packing sheets for all material shipped from the plant.

2. Many of the items described in paragraph 1 above are shipped by the Terminal Freight Handling Company, a Delaware Corporation, from its terminal facilities in Philadelphia, Pennsylvania.

3. The items described in paragraph 1 above and shipped by the Terminal Freight Handling Company are used in connection with the performance of National Defense Contracts that the Convair Division of General Dynamics Corporation holds with the United States Government.

4. The approximate value of the items described in paragraph 1 above which are shipped from Philadelphia, Pennsylvania by the Terminal Freight Handling Company to our facility in San Diego, California annually is approximately two hundred fifty thousand dollars ($250,000).

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5. Any delay in the receipt of the items described in paragraph 1 above would result in irreparable delay in the performance of the defense contracts described here-in and would result in substantial irreparable detriment to National Defense Projects.

I have read the foregoing statement and swear that it is true.

JOHN C. RUZICH.

Subscribed and sworn to, before me, on April 19, 1969 at San Diego, California.

V. JEAN HILL,
(SEAL) *Notary Public.*

My Commission Expires Feb. 19, 1973.

COMMONWEALTH OF PENNSYLVANIA, }
COUNTY OF PHILADELPHIA. } ss.

I, Bernard Samoff, being first duly sworn, depose and say that I am Regional Director of the Fourth Region of the National Labor Relations Board; that I have read the foregoing petition and exhibits and know the contents thereof; that the statements therein made as upon personal knowledge are true and those made as upon information and belief I believe to be true.

BERNARD SAMOFF,
BERNARD SAMOFF.

Subscribed and sworn to before me this 24th day of April, 1969.

LILLIAN K. SCHAEFFER,
(SEAL) *Notary Public.*

Lillian K. Schaeffer, Notary Public, Philadelphia, Philadelphia County, My Commission expires Nov. 21, 1971.

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APPENDIX F.

STATUTE INVOLVED.

NATIONAL LABOR RELATIONS ACT.

(61 Stat. 136, 29 U. S. C. § 151, et seq.)

SEC. 8(b)(4)(B); (29 U. S. C. § 158(b)(4)(B)):

"It shall be an unfair labor practice for a labor organization or its agents . . .

(4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is: * * *

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9: *Provided*, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing: * * *"

SEC. 10(e), (f), (g), (h), (j) and (l); (29 U. S. C. § 160(e), (f), (g), (h), (j) and (l)):

"(e) The Board shall have power to petition any

court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recom-

mendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

(g) The commencement of proceedings under subsection (e) or (f) of this section shall not, unless specifically ordered by the court, operate as a stay of the Board's order.

(h) When granting temporary relief or a restraining order, or making and entering a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part an order of the Board, as provided in this section, the jurisdiction of courts sitting in equity shall not be limited by the Act entitled 'An Act to amend the Judicial Code and to define and limit the jurisdiction of courts sitting in equity, and for other purposes,' approved March 23, 1932 (U. S. C., Supp. VII, title 29, secs. 101-115).

(j) The Board shall have power, upon issuance of a complaint as provided in subsection (b) charging that any person has engaged in or is engaging in an unfair labor practice, to petition any district court of the United States (including the District Court of the United States for the District of Columbia), within any district wherein the unfair labor practice in question is alleged to have occurred or wherein such person resides or transacts business, for appropriate temporary relief or restraining order. Upon the filing of any such petition the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper.

(l) Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4) (A), (B), or (C) of section 8(b), or section 8(e) or section 8(b)(7), the preliminary investigation of such charge shall be made forthwith and given priority over all other cases except cases of like character in the office where it is filed or to which it is referred. If, after such investigation, the officer or regional attorney to whom the matter may be referred has reasonable cause to believe such charge is true and that a complaint should issue, he shall, on behalf of the Board, petition any district court of the United States (including the District Court of the United States for the District of Columbia) within any district where the unfair labor practice in question has occurred, is alleged to have occurred, or

wherein such person resides or transacts business, for appropriate injunctive relief pending the final adjudication of the Board with respect to such matter. Upon the filing of any such petition the district court shall have jurisdiction to grant such injunctive relief or temporary restraining order as it deems just and proper, notwithstanding any other provision of law: *Provided further,* That no temporary restraining order shall be issued without notice unless a petition alleges that substantial and irreparable injury to the charging party will be unavoidable and such temporary restraining order shall be effective for no longer than five days and will become void at the expiration of such period: *Provided further,* That such officer or regional attorney shall not apply for any restraining order under section 8(b)(7) if a charge against the employer under section 8(a)(2) has been filed and after the preliminary investigation, he has reasonable cause to believe that such charge is true and that a complaint should issue. Upon filing of any such petition the courts shall cause notice thereof to be served upon any person involved in the charge and such person, including the charging party, shall be given an opportunity to appear by counsel and present any relevant testimony: *Provided further,* That for the purposes of this subsection district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in promoting or protecting the interests of employee members. The service of legal process upon such officer or agent shall constitute service upon the labor organization and make such organizations a party to the suit. In situations where such relief is appropriate the procedure specified herein shall apply to charges with respect to section 8(b)(4)(D)."

In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 1481

TERMINAL FREIGHT COOPERATIVE ASSOCIATION and TERMINAL FREIGHT HANDLING CO., PETITIONERS

v.

BERNARD SAMOFF, Regional Director of the Fourth Region of the NATIONAL LABOR RELATIONS BOARD, *et al.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE REGIONAL DIRECTOR IN OPPOSITION

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1. Petitioners filed a charge with the Regional Director of the National Labor Relations Board alleging that the respondent Union was engaging in a secondary boycott in violation of Section 8(b)(4)(B) (29 U.S.C. 158(b)(4)(B)) of the National Labor Relations Act. Upon determining that a complaint should issue on the charge, the Regional Director petitioned

the United States District Court for the Eastern District of Pennsylvania for an injunction pursuant to Section 10(l) (29 U.S.C. 160(l)) of the Act, and also obtained a temporary restraining order enjoining the Union's alleged secondary activity. Before the date set for hearing on the injunction petition, the Regional Director and the Union entered into a stipulation providing for a cessation of the Union's alleged secondary activity pending a final determination by the Board. The stipulation further provided that, in the event its terms were violated, the temporary restraining order previously issued would be reinstated. The district court issued an order approving the stipulation over the objections of the charging parties. (Pet. App. 4A-6A.)[1] The charging parties appealed this order to the court of appeals; but, meanwhile, the underlying dispute was settled through execution of a collective bargaining agreement between the Union and the employer with whom it had its primary dispute. For this reason, the court below dismissed the appeal. (Pet. App. 1A-3A.)

2. The question presented—concerning the right of a charging party in a Section 10(l) proceeding to appeal from the district court's refusal (in which the Regional Director has acquiesced) to issue an injunction—does not warrant review in this case. Pursuant to the stipulation approved by the district court, the

[1] The charging parties objected on the ground that the stipulation provided inadequate relief and protection. The district court overruled the objection, after affording the charging parties an opportunity to present their views in a conference held in chambers. (Pet. 6-7.)

Union's secondary activity has ceased. The dispute which gave rise to that activity has been resolved through the execution of a three-year collective bargaining agreement between the Union and the primary employer. Moreover, the underlying Board proceeding will, in all probability, shortly be closed, since an informal settlement agreement has been approved by both the Regional Director and the General Counsel (Pet. 19-20),[2] and all that remains is for the Union to complete the notice-posting requirement. In these circumstances, the case is not an appropriate one in which to review the issue which petitioners raise. See *Sears, Roebuck & Co.* v. *Carpet Layers, Local 419*, No. 476, this Term, decided April 27, 1970; cf. *McLeod* v. *General Electric Co.*, 385 U.S. 533.

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Solicitor General.

ARNOLD ORDMAN,
General Counsel,
National Labor Relations Board.

MAY 1970.

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[2] Petitioner's appeal to the Board (Pet. 20) has been dismissed on the ground that the Board lacks jurisdiction to review the General Counsel's acceptance of the settlement.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969.

No. 1481

TERMINAL FREIGHT COOPERATIVE ASSOCIATION AND TERMINAL FREIGHT HANDLING CO.,
Petitioners,

vs.

BERNARD SAMOFF, REGIONAL DIRECTOR OF THE FOURTH REGION OF THE NATIONAL LABOR RELATIONS BOARD, FOR AND ON BEHALF OF THE NATIONAL LABOR RELATIONS BOARD, AND INTERNATIONAL ASSOCIATION OF MACHINISTS, DISTRICT LODGE NO. 1,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI BEFORE JUDGMENT TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

REPLY BRIEF OF PETITIONERS.

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ON PETITION FOR WRIT OF CERTIORARI BEFORE JUDGMENT TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

REPLY BRIEF OF PETITIONERS.

In opposing the instant Petition for Writ of Certiorari, the Regional Director relies on the argument that this case is not an "appropriate" vehicle in which to review the issues presented, since the underlying dispute which gave rise to those issues was allegedly settled during the course

of the litigation below.[1] The Regional Director does not, however, expressly contend either that the case is moot or that a decision on the merits would fail to benefit these and all prospective charging parties before the National Labor Relations Board.

The Regional Director's Opposition does contain three misleading and incorrect implications in support of its conclusion that this case is not "appropriate" for review, which warrant response:

(1) *The underlying case which gave rise to the instant Petition is, for all practical purposes, settled and ended.*

This assertion is premised on the Director's view that ". . . the underlying Board proceeding will, in all probability, shortly be closed, since an informal settlement agreement has been approved by both the Regional Director and the General Counsel", and that the Board had dismissed the charging parties' subsequent appeal of the General Counsel's decision. (Opp., p. 3)

In fact, and contrary to the Director's view, the underlying case is still in active litigation. On May 15, 1970, the charging parties filed a Petition for Review of an Order of the National Labor Relations Board, in the Court of Appeals for the Third Circuit, docketed as Case No. 18,948, in an effort to test the sufficiency of the terms of the Settlement Agreement by which the Director and the Board unilaterally seek to close the underlying case. That Petition for Review is predicated principally upon the propositions, (i) that the Settlement is inadequate in that it fails to

1. In so arguing, the Regional Director misrepresents the scope of the questions presented for review by referring only to the question of the charging parties' right to appellate review of a district court's refusal to grant injunctive relief under Section 10(l) of the National Labor Relations Act. However, this case raises other equally fundamental questions in the interpretation of Section 10(l), involving the nature and extent of charging parties' participatory rights in the district court proceedings themselves, to which the Regional Director's opposition is silent. (Pet., p. 3)

provide any remedy against one of the joint perpetrators of the unfair labor practices purportedly remedied in the Settlement and (ii) the charging parties are, at least, entitled to a hearing on their objections to that Settlement as is guaranteed them in *Leeds & Northrup* v. *N. L. R. B.*, 357 F. 2d 527 (CA 3, 1966). Appropriately, the Petition for Review has been filed in the same Circuit as issued *Leeds & Northrup*. Moreover, the Director and the Board have been on notice for over a year of the charging parties' intention to urge, in the Court of Appeals if necessary, the position taken by them in the aforesaid Petition for Review. Thus, that position was articulated to the Director in objecting to the proposed terms of the Settlement on May 23, 1969; it was restated to the General Counsel in appealing the Director's unilateral acceptance of the Settlement on January 22, 1970; it was argued to the Board on April 16, 1970 and May 6, 1970 in an effort to review the General Counsel's refusal to overrule the Director, all but the last of which occurred prior to and independently of the filing of the instant Petition for Writ of Certiorari.

Accordingly, the underlying dispute which gave rise to the injunction proceeding involved herein has not been resolved; the case has not been closed, there has as yet been no compliance by the Union with even the minimal and inadequate provisions of the Settlement,[2] and a favorable result in the Court of Appeals will return the parties to the position they were in before the district court.

(2) *The charging parties were not deprived of any meaningful relief to which they were entitled in the district court.*

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2. The charging parties have sought on several occasions to secure a stay of the Director's efforts to secure compliance with the terms of the Settlement Agreement pending review of the adequacy of its provisions. Requests for such a stay were made to the Director on May 6, 1970 and to the general counsel on May 11, 1970 and May 28, 1970. The first two requests were denied; no response has as yet been made to the third.

The Director's Opposition implies that the approval by the district court of a Stipulation whereby the Union agreed to cease its unlawful conduct, in lieu of granting injunctive relief, afforded adequate relief to the charging parties notwithstanding the mandatory duty imposed by Section 10(l) that the Director "shall" seek injunctive relief. In fact, the Stipulation, which was approved over the charging parties' objections, was not an adequate substitute for the statutorily-guaranteed right to injunctive relief. Whereas the granting of an injunction after a hearing requested by the charging parties would have the significant deterrent effect of subjecting a violating party to proceedings in contempt, the Stipulation had no such deterrent effect. That Stipulation constituted only an agreement not to engage in secondary boycotts which, if violated, permitted the Board, when and if it was able and disposed, to secure from the district court an *ex parte* restraining order. Such an order, pursuant to the express terms of Section 10(l), would expire after five days. For any further relief, a full hearing is required with notice to and full participatory rights guaranteed to all parties. Thus, the resumption of unlawful boycott activity by the Union would not have subjected it to contempt but would only have entitled it to a full hearing whose conclusion could only have yielded precisely that injunction to which the charging parties had claimed themselves to be entitled from the outset.

Apart from the delays and the absence of genuine deterrent effect inherent in this procedure, the district court's failure to recognize the charging parties' "party" standing under Section 10(l) yielded further damage to their legitimate interests. Pursuant to the Stipulation actually approved by the district court only the Board was empowered to petition the court for relief should the Union resume its unlawful conduct. However, had the district court acknowledged the charging parties' status as

"parties", then those charging parties could have acted unilaterally to bring to the court's attention any subsequent resumption of the unlawful conduct which caused the Board to file for injunctive relief in the first instance and without the delays inherent in the administrative process which traditionally inhibits the Board's ability to move with equivalent dispatch. Similarly, had the district court recognized that status, the charging parties might have effected a continuation of the injunction suit on the court's docket notwithstanding its approval of the Stipulation, as a means for guaranteeing their speedy access to the court should the Stipulation be violated and should the Board be unwilling or unable to proceed expeditiously on their behalf.[3]

These respects are illustrative of the injury to the charging parties' interests which resulted from the district court's approval of the Stipulation in lieu of holding a hearing on the pending petition for injunctive relief. Nor are these matters of merely academic interest today, for the Union may at any time resume its picketing of these charging parties pursuant to any current or future dispute with the same primary employer. The fact that a contract was executed between the primary and the Union during the course of the litigation below does not warrant the conclusion that the Union will have no further disputes with that company—as, for example, in the interpretation and enforcement of that contract—and that the Union will not seek once again to apply pressure to the primary by picketing these neutral charging parties. The real possibility of such a resumption, coupled with the inadequacy of the remedy afforded by the Stipulation, evidences the injury to the

3. The very nature of the charging parties' business as well as their significant involvement in the National Defense makes expeditious relief from unlawful picketing and boycotts particularly important. Such a need was explicitly recognized both by the district court below (Pet. App. 7A-10A) and by the Director (Pet. App. 15A-17A).

charging parties which has resulted and does result from the erroneous decisions of the district court which the instant Petition for Writ of Certiorari seeks to review.

(3) *The Instant Case Is Moot.*

The Director's implied suggestion of mootness appears predicated upon the theory that further relief from this Court is unnecessary, rather than on the basis of this Court's holding in *Sears, Roebuck & Co.* v. *Carpet Layers, Local 419* (No. 476, this Term, decided April 27, 1970) that the provisions of Section 10(l) of the Act affirmatively preclude the granting of any relief. Although the Director cites *Sears,* that case is clearly inapposite. In *Sears,* mootness was said to result from the fact that the Board had rendered a "final adjudication" on the merits of the underlying dispute, an act which terminated the right to injunctive relief. Here, there has been no adjudication of the merits by the Board whatever; indeed, the Board has taken the view in its response to the charging parties' appeal of the Director's unilateral acceptance of the Settlement Agreement, that it lacks jurisdiction to review the merits of the Director's (or the General Counsel's) decision. (Opp., p. 3.)[4] Accordingly, this case is not moot by dictate of the statute.

The Director's suggestion of mootness reduces to the apparent contention that the cessation (at least temporarily) of unlawful conduct pursuant to an accommodation reached on the underlying dispute during the course of litigation renders the case moot.

As a proposition of law the Director's contention is incorrect. This Court has repeatedly held that a case does not

4. The charging parties' pending Petition for Review in the Third Circuit seeks to test the Board's alleged lack of jurisdiction to render such a review on the merits. In any event, it is clear that the Board has not rendered the "final adjudication" contemplated by Section 10(l) and upon which the decision in *Sears* is based.

become legally moot when, as in this case, unlawful acts are discontinued during litigation or under the duress of legal process. *NLRB* v. *Mexia Textile Mills, Inc.*, 339 U. S. 563; *Local 1976, United Brotherhood of Carpenters and Joiners, et al.* v. *NLRB*, 357 U. S. 93 (involving, as here, the cessation of an unlawful secondary boycott, the settlement of the underlying substantive dispute, and the execution of a contract, all of which, as here, occurred after the institution of unfair labor practice charges with the Board); and *NLRB* v. *Raytheon Co., et al.*, No. 440, this Term, in which unfair labor practices committed in connection with the holding of a representation election had ceased, compliance with the Board's remedial order had been effected, and a second and valid election had thereafter been conducted. The Board's insistence in *Raytheon* that the case was not moot is inconsistent with the Director's contrary contention here.

No factors have been alleged or exist which should result in a greater insullation of the Union from the consequences of their wrongful conduct herein than existed as to any of the respondents in the cases cited above. Similarly, these charging parties are in no respect less in need of effective protection against a future resumption or recurrence of the Union's unlawful acts than were the charging parties in those cases.

An additional and independent basis for this Court's rejection of the Director's suggestion of mootness here results from the singular nature of cases arising under Section 10(l). Such cases, unlike other disputes arising under the Act, involve interim orders of so short a duration and economic pressures on aggrieved employers of such magnitude that, pursuant to the Director's test for "appropriateness" for review, virtually no case arising under Section 10(l) could be other than moot when it reaches this

Court; either the unlawful acts will have ceased pursuant to the employer's capitulation; or the employer will have agreed to some settlement in order to return to full operation; or, for those employers who resist the economic pressures inherent in boycott activity, the Board will have rendered a "final adjudication"; or, as here, the Director will accept a compromise Settlement Agreement over the charging parties' objections resulting in a cessation of the unlawful conduct.

The Director's apparent contention that each of these cases is or would be "inappropriate" for review renders the Board and its agents, rather than the courts, the ultimate arbiter of Congress' intention in enacting Section 10(l).[5] No basis has been suggested to support such a view.

On the contrary, this Court has refused to permit such a limitation on the right to judicial review. *Southern Pacific Terminal Company* v. *Interstate Commerce Commission, et al.*, 219 U. S. 498; *Moore* v. *Ogilvie*, 394 U. S. 814 (cf. Pet., pp. 22-3).

This Court is urged in the instant proceeding to adhere to the principles of these cases whose wisdom was recently summarized as follows:

> "[M]ootness should never perpetually frustrate 'the vital importance of keeping open avenues of judicial review.' If the court is confronted with a substantial likelihood that an issue it believes moot will always arrive there in the same condition because of the inherent nature of the issue, the Court should not refuse review on the basis of mootness. . . . [T]he real choice is not between taking or not taking risks with the qual-

5. Moreover, under this view the Board is empowered unilaterally to determine whether any dispute arising under Section 10(l) may be reviewed merely by withholding or by expediting its "final adjudication" of the merits of the underlying dispute.

ity of the judicial process, but between securing or not securing the values of appellate review—stability, uniformity, and objectivity.'"[6]

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6. Note, *Mootness on Appeal in the Supreme Court*, 83 Harv. L. Rev. 1672, 1692 (1970).

CERTIORARI DENIED